92-66

Supreme Court, U.S.
FILED
JUN 18 1992
OFFICE OF THE CLERK

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CARPENTERS PENSION TRUST FUND
FOR NORTHERN CALIFORNIA,
Petitioner,

v.

CMSH COMPANY, INC. and CMSH FRAMING,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Can a multiemployer pension plan treat two entities as one "alter ego" employer for purposes of assessing withdrawal liability under ERISA § 1381(a) without having to establish the employer's intent to avoid a "preexisting duty" at the time the alter ego was created?

LIST OF PARTIES

The parties to the proceeding below and before this Court are:

1. CMSH Company;
2. CMSH Framing; and,
3. Carpenters Pension Trust Fund for Northern California.

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PETITION FOR WRIT OF CERTIORARI

The Carpenters Pension Trust Fund For Northern California (hereinafter "Carpenters Pension Trust") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States District Court of Appeals for the Ninth Circuit entered in this proceeding on April 28, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A, p. 1a, *infra*) is not officially reported and was filed on April 28, 1992. The Order of the United States District Court for the Northern District of California Denying Petitioner's Motion to Vacate Arbitration Award (Appendix B, p. 12a, *infra*) was filed on April 10, 1990. The Judgment affirming the Arbitration Award (Appendix C, p. 14a, *infra*) was filed on April 25, 1990. The Arbitration Decision and Award

(Appendix D, p. 15a, *infra*) is unreported and was filed on December 18, 1989.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on April 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c).

STATUTES INVOLVED

A. Labor Management Relations Act of 1947, as amended, § 302(c)(5), 29 U.S.C. 186(c)(5).

B. Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001, *et seq.*

Pertinent portions of these statutory provisions are reproduced at Appendix E, p. 31a, *infra.*

STATEMENT OF THE CASE

Carpenters Pension Trust is an employee benefit plan established pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended (hereinafter "LMRA"), 29 U.S.C. § 186(c)(5), and the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. §§ 1001-1461, as amended by the Multiemployer Pension Plan Amendment Act of 1980, 29 U.S.C. § 1381, *et seq.* (hereinafter "MPPAA"), Publ. L. No. 96-364, 94 Stat. 1208. The Carpenters Pension Trust was created by a collective bargaining agreement and Trust Agreements between the Carpenters 46 Northern California Counties Conference Board ("Carpenters Union") and various multiemployer associations representing construction industry employers in collective bargaining with the Carpenters Union.

CMSH Company, Inc. (hereinafter "CMSH"), was founded in 1972 as a licensed contractor, with William Crouse as President. In June, 1974, Crouse signed a collective bargaining agreement with the Carpenters Union. The initial three-year agreement ended in June, 1977. The

contract was renewed for another three year period, 1977-80. CMSH employed workers and made payments to the Carpenters Pension Trust under the terms of the collective bargaining agreement from 1974 until mid-1978. Crouse and Robert Hagood were the sole owners of CMSH, each owning 50% of the company.

On July 11, 1978, CMSH Framing was incorporated in California as a licensed contractor. There was significant overlap of ownership between CMSH and CMSH Framing. Crouse and Hagood each owned 27.5% of CMSH Framing, totaling 55% ownership. The remaining 45% was owned by Michael Stiles, the President of CMSH Framing. CMSH Framing took over CMSH's operations under the collective bargaining agreement with the Carpenters Union.

CMSH Framing did not enter a new agreement with the Carpenters Union but, instead, hired workers under the terms and conditions of the old collective bargaining agreement negotiated by CMSH. This agreement expired June 5, 1980, and CMSH Framing attempted to negotiate a new agreement with the Carpenters Union. CMSH Framing continued to employ workers and contribute to the Carpenters Pension Trust until October, 1982, when it reached an impasse in negotiations with the Carpenters Union.

All negotiations between the Carpenters Union and CMSH Framing, like the negotiations between the Carpenters Union and CMSH, were conducted by Crouse, the President of CMSH and the vice president of CMSH Framing. Stiles, the President of CMSH Framing, was never directly involved with the negotiations. Stiles, although supposedly President of CMSH Framing, effectively was a working foreman. In addition, he was reported as a carpenter by CMSH Framing to the Carpenters Pension Trust on the monthly transmitted reports which accompanied the benefit payments. An employee of both CMSH and CMSH Framing, Anne Rone,

handled the contribution report forms submitted to the Carpenters Pension Trust. On all the fund reports, the documents were addressed to CMSH Company, but were paid by checks in the name of CMSH Framing.

In 1981, CMSH Framing utilized the Carpenters Apprenticeship Training Program and employed indentured apprentices under the Carpenters' program which is certified by the Division of Apprenticeship Standards for the State of California. On August 18, the Department of Industrial Relations notified CMSH Framing that it was certifying registration of eight apprentices. The Trust Agreement requires that employers utilizing the benefits of the apprenticeship trust be signatory to a Carpenters' contract or execute a copy of the Trust Agreement in writing and deposit it with the Board of Trustees. There is nothing in the record which would indicate that CMSH Framing ever executed a Trust Agreement for the Apprenticeship Trust.

When CMSH Framing was founded, it received its capital investment from CMSH in the form of a non-interest bearing note in the amount of $100,000. There was no indication in the financial records which were part of the record that CMSH Framing ever made payments on the $100,000 advance or that CMSH ever made an effort to call the note.

After CMSH Framing was dissolved on September 30, 1986, the Carpenters Pension Trust notified CMSH and CMSH Framing of a withdrawal liability assessment of $229,170.00 pursuant to 29 U.S.C. § 1381(a). The Carpenters Pension Trust treated CMSH and CMSH Framing as one employer for purposes of the liability. The District Court entered the liability issue be submitted to an arbitrator. The arbitrator determined that CMSH and CMSH Framing were alter egos and jointly responsible for the withdrawal liability. On April 25, 1990, the District Court upheld the arbitrator's judgment. CMSH and CMSH Framing appealed the liability of CMSH;

they did not contest the independent withdrawal liability of CMSH Framing.

The question presented for review in this Petition—whether or not CMSH and CMSH Framing were jointly liable for withdrawal liability purposes—depends upon this Court's interpretation of the alter ego doctrine.

The Ninth Circuit held that because CMSH Framing replaced CMSH as the employer and CMSH ceased all covered operations prior to the effective date of the MPPAA, CMSH was liable only if it and CMSH Framing were treated as the same corporation. The court began by reviewing the statutes and regulations that govern when two corporations can be treated as one for MPPAA withdrawal liability. According to MPPAA, CMSH and CMSH Framing were not businesses under common control, which includes "brother-sister" groups of corporations wherein five or less individuals have a "controlling interest" in both corporations of at least 80% voting and ownership interest. 26 C.F.R. § 1.414(c)-2. Although Crouse and Hagood owned 100% of CMSH, they owned only 55% of CMSH Framing. Therefore, they did not meet the 80% requirement. The Ninth Circuit then applied an alter ego analysis, based on *J.M. Tanaka Const. v. NLRB*, 675 F.2d 1029, 1033-35 (9th Cir. 1982), and held that *Tanaka* only applied when the alter ego was formed to avoid a preexisting duty. This conclusion is contrary to the law in other circuits and misstates Ninth Circuit law as well.

REASONS FOR GRANTING THE WRIT

The Supreme Court of the United States provides for review on a writ of certiorari when a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter. *Marks v. United States*, 430 U.S. 188, 189 (1977); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981). Circuits are split on the issue of intent as a requirement for a finding of alter ego status. The Ninth Circuit in the instant case required intent to avoid a preexisting duty, while the Second Circuit holds just the opposite. *Goodman Piping Products, Inc. v. NLRB*, 741 F.2d 10 (2nd Cir. 1984).

Additionally, this Court will grant certiorari when an important issue is involved. The problem must be "beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). The sanctity of pension benefits, an expected and earned right of thousands of working men and women who have paid into their unions for a lifetime, cannot be compromised. Congress enacted MPPAA to protect these pension plan participants. If this Ninth Circuit decision stands, the purpose of the MPPAA withdrawal liability provisions are undermined.

I. THE CIRCUIT COURTS OF APPEALS ARE IN CONFLICT TO THE INTENT REQUIREMENT OF THE ALTER EGO DOCTRINE.

Although this Court indicated in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 62 S.Ct. 452, 86 L.Ed. 718 (1942), that "a disguise intended to evade" the labor laws was a sufficient condition to impose alter ego status, it did not decide whether such intent was necessary to that determination. No requirement of intent was stated, nor has one been required in a majority of circuits that have ruled on alter ego status.

The common theory in an alter ego analysis that most of the circuits follow is the existence of a disguised continuance. A court examines a number of factors: whether the two enterprises have substantially identical management, business purposes, operation, equipment, customers, supervision and ownership. As to the intent issue, the circuits vary considerably.

The First, Eighth and Fourth Circuits have held that unlawful motive or intent are necessary for a finding of alter ego status.[1] The Third Circuit is unclear on the intent issue, sometimes requiring intent, other times not even mentioning the issue.[2] The Sixth, Ninth, Tenth and D.C. Circuits consider intent as a relevant factor to consider in an alter ego analysis, but do not hold it as a prerequisite.[3] Finally, the Second Circuit has expressly rejected the argument that intent or anti-union animus is a prerequisite to a finding of alter ego status.[4]

As to the Ninth Circuit, cases previous[5] and subsequent[6] to this decision have focused on the factors set

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[1] *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18 (1st Cir. 1983), *cert. denied* 464 U.S. 892, 104 S.Ct. 327, 78 L.Ed.2d 228 (1983); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1311 (8th Cir. 1984), *cert. denied*, 469 U.S. 1088, 105 S.Ct. 595, 83 L.Ed.2d 704 (1984); *Alkire v. NLRB*, 716 F.2d 1014 (4th Cir. 1983).

[2] *NLRB v. Scott Printing Corp.*, 612 F.2d 783 (3rd Cir. 1979); *NLRB v. Al Bryant, Inc.*, 711 F.2d 543 (3rd Cir. 1983), *cert. denied* 464 U.S. 1039, 104 S.Ct. 699, 79 L.Ed.2d 165 (1984).

[3] *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1986); *J. M. Tanaka Const. v. NLRB*, 675 F.2d 1029, 1033-35 (9th Cir. 1982); *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416 (D.C. Cir. 1984); *NLRB v. Tricor Products, Inc.*, 636 F.2d 266 (10th Cir. 1988).

[4] *Goodman Piping Products, Inc. v. NLRB*, 741 F.2d 10 (2nd Cir. 1984).

[5] *A. Dariano & Sons v. Dist. Council No. 33*, 869 F.2d 514 (9th Cir. 1989); *Haley & Haley v. NLRB*, 880 F.2d 1147 (9th Cir. 1989).

[6] *NLRB v. O'Neil*, —— F.2d ——, Nos. 90-70643, 90-70645, June 5, 1992.

forth in *Tanaka*. In the instant case, the Ninth Circuit interpreted *J. M. Tanaka Const. v. NLRB*, 675 F.2d 1029 (1982) as requiring intent to avoid a preexisting obligation in order to establish alter ego doctrine. *Tanaka* enumerated a number of factors a court must consider in determining if two businesses are alter egos: (1) centralized control of labor relations, (2) common management, (3) interrelation of operations, and (4) common ownership and financial control. No one factor was controlling and all need not be present. *Tanaka*, *supra* at 1033. The most important single factor was centralized control of labor relations. *Id.* at 1034. Finally, there was also substantially undisputed evidence that R. M. Tanaka, the second entity, was created for the purpose of eliminating the high cost of dealing with the union. *Id.* at 1035.

A. Circuits Requiring Intent.

The First Circuit and the Eighth Circuit have held that "unlawful motive or intent are critical inquiries in an alter ego analysis." *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 24 (1st Cir. 1983), *cert. denied* 464 U.S. 892, 104 S.Ct. 327, 78 L.Ed.2d 228 (1983); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1311 (8th Cir. 1984), *cert. denied*, 469 U.S. 1088, 105 S.Ct. 595, 83 L.Ed.2d 704 (1984). However, a previous Eighth Circuit opinion held that two companies were alter egos if there was substantial identity in terms of corporate ownership, management, business purpose, operation, equipment, customers and supervision, without mention of an intent inquiry. *NLRB v. Campbell Harris Electric, Inc.*, 719 F.2d 292, 295 (8th Cir. 1983). Under the approach advocated by the First and Eighth Circuits, a finding of alter ego status requires intentional employer evasiveness.

A similar, but purportedly broader, approach was adopted by the Fourth Circuit in *Alkire v. NLRB*, 716 F.2d 1014 (4th Cir. 1983). There the court set forth a two step analysis with an emphasis on the employer's

motivation for changing its corporate form. The court stated:

> When business operations are transferred, the initial question is whether substantially the same entity controls both the old and the new employer. If this control exists, then the inquiry must turn on whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor organizations.
>
> Without some future benefit reasonably accruing from the employer's action, then the "force" of the action ends with the transfer itself and the transfer of ownership is *bona fide*. If, however, the transfer, by eliminating an NLRA imposed duty, provides a continuing benefit to the old employer, then the force of the closing survives the transfer. To the extent that obtaining the benefit was a motive for the transfer, or was a reasonable foreseeable fact, the result represents disguised continuance of the old employer. *Id.* at 1020.
>
> Linking employer motivation for the transfer of its business to obtaining a future benefit represents a broader standard than does requiring "[a]nti union animus or intent to evade labor obligations," . . . and better strikes a balance between the notion of limited corporate liability and the protection of those employer rights embodied in the national labor laws." *Id.* (Citation omitted.)

B. Third Circuit Is Unclear On The Intent Requirement.

A Third Circuit opinion, *NLRB v. Scott Printing Corp.*, 612 F.2d 783 (3rd Cir. 1979), has been cited as limiting imposition of alter ego status to instances where intent to evade union obligations is found. In *Scott Printing*, the Court "assum[ed] without deciding that . . . the General Council must prove [the employer] intended to evade its duty to bargain." 612 F.2d at 787.

However, in *NLRB v. Al Bryant, Inc.*, 711 F.2d 543 (3rd Cir. 1983), *cert. denied* 464 U.S. 1039, 104 S.Ct. 699, 79 L.Ed.2d 165 (1984), the Court cited *Scott Printing* but merely set forth the control and operational factors as the criteria relative to a determination of alter ego status. *Id.* at 533-54. The Court did not mention intent as an element. Therefore, it is unclear whether the Third Circuit has adopted an intent element as an essential inquiry under an alter ego analysis.

C. Circuits Where Intent Is A Factor But Not A Prerequisite To A Finding Of Alter Ego Status.

The Sixth Circuit concluded that a finding of employer intent was not essential or a prerequisite to imposition of alter ego status. *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1986). Instead, it was merely one of the relevant factors that the Board could consider, along with the well established factors of substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership, in determining alter ego status. The essential inquiry under an alter ego status is "whether there was a *bona fide* discontinuance and a true change of ownership . . . or merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106, 52 S.Ct. 452, 456, 86 L.Ed. 718 (1942). The essential inquiry did not require the Board to find that an employer intended to evade obligations under the Act in order to impose alter ego status. Instead, deciding whether a successor corporation was really the predecessor corporation by another name merely required an examination of all the circumstances of each case, and a weighing of the relevant factors. This conclusion was consistent with the cases discussing alter ego doctrine since they generally recognize that the alter ego analysis should be flexible.

Some Circuits have given substantial weight to, but stopped short of making a prerequisite of, employer in-

tent in determining alter ego status. The Tenth Circuit first observed in *NLRB v. Tricor Products, Inc.*, 636 F.2d 266 (10th Cir. 1988) that there is no "hard and fast rule" in determining whether a successor employer is the alter ego of its predecessor and there may be many relevant factors. *Id.* at 270. The Court then listed the considerations it believed were important, including the relationship between the management of the two companies, continuity of the work force, continuity of equipment and location, similarity of customers and accounts, similarities in the type of work, and the assumption of liabilities in the successor company. *Id.* As to employer intent, the court stated:

> If an employer makes changes in its business operation to deliberately get rid of the union, then the employer is more likely to be an *alter ego*. If, however, the employer has legitimate economic reasons for the changes, and is not motivated by anti-union sentiment, the second employer is more likely to be deemed a mere successor to the first. In connection with this particular aspect, we think evidence of anti-union sentiment by an employer, occurring either before or after the change in the structure of business is germane. *Id.*[7]

Accordingly, the Court found that the employer's intent is relevant but did not hold it to be essential in imposing alter ego status.

The D.C. Circuit considered the elements relevant to a finding of alter ego status in *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416 (DC Cir. 1984). The court listed the same control and operational factors as "guiding criteria" and added, "the Board will give weight to

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[7] Two years after CMSH Framing was created, they terminated their contract with the Union. Thus, anti-union sentiment was expressed two years after the alter ego was created.

evidence that the motive for the transaction was to evade statutory and contractual duties under the NLRA or to escape the reach of the Board's remedies." *Id.* at 1419. A finding of motive or intent was not classified as a prerequisite.

D. The Second Circuit Rejects An Intent Requirement.

The Second Circuit has expressly rejected the argument that a finding of anti-union animus or an intent to evade a prerequisite to holding that one company is the alter ego of another. In *Goodman Piping Products, Inc. v. NLRB*, 741 F.2d 10 (2nd Cir. 1984), the Court observed that anti-union animus may be "germane" or even a sufficient basis for imposing alter ego status; however, they do not establish that anti-union motivation is necessary. *Id.* at 12. The Court, instead, determined that "substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership" were the "key" inquiries and, in light of those criteria, found substantial evidence to support the imposition of alter ego status. *Id.* at 11.

E. Disgused Continuance Is The Basis Of An Alter Ego Analysis.

Absent a decision by this Court on the issue of intent in an alter ego analysis, Circuit Court decisions have spanned the distance—from requiring intent, to mentioning it as a factor, to no mention of intent at all. Regardless of where a circuit stands on the intent issue, most focus on the issue of disguised continuance as the critical inquiry in an alter ego analysis. Courts cite to four factors as the basis of a disguised continuance: (1) centralized control of labor relations; (2) common management; (3) interrelation of operations; and, (4) common ownership and financial control.

The Ninth Circuit[8] has previously looked for disguised continuance as have the Second,[9] Third,[10] Fifth[11] and Sixth Circuits.[12] Applied to the instant case, CMSH Framing can be found to be a disguised continuance of CMSH.

1. *Centralized Control of Labor Relations.*

This is considered to be the most important factor and is clearly established between CMSH and CMSH Framing.[13] Robert Crouse controlled the labor relations, negotiating the collective bargaining agreement for both CMSH and CMSH Framing. Anne Rone, an employee of both CMSH entities handled employee benefit contribution reports to the Carpenters Trust Funds for both entities.

2. *Common Management.*

Common management could be found in both CMSH and CMSH Framing. Crouse was the president of CMSH and the vice president of CMSH Framing. Checks submitted by CMSH Framing to the Carpenters Trust Funds covering fringe benefit payments were either signed by Crouse and/or Hagood. Although Stiles was a 45% owner of CMSH Framing, he was more of a working foreman and a carpenter.

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[8] *A. Dariano & Sons v. Dist. Council No. 33*, 869 F.2d 514 (9th Cir. 1989); *Haley & Haley v. NLRB*, 880 F.2d 1147 (9th Cir. 1989); *NLRB v. O'Neill*, —— F.2d ——, Nos. 90-70643, 90-70645, June 5, 1992.

[9] *Goodman Piping Products, Inc. v. NLRB*, 741 F.2d 10 (2nd Cir. 1984).

[10] *NLRB v. Al Bryant, Inc.*, 711 F.2d 543 (3rd Cir. 1983).

[11] *Carpenters Local U. No. 1846 v. Pratt-Farnsworth*, 690 F.2d 489 (5th Cir. 1982).

[12] *NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331 (6th Cir. 1990).

[13] *Tanaka* at 1034.

3. Interrelation of Operations.

There was significant interrelation of operations between CMSH and CMSH Framing. CMSH Framing was created by CMSH, evidenced by a letter of February 28, 1980 written by Crouse to the Carpenters indicating that CMSH ". . . has now separated into several affiliated corporations." CMSH Framing stepped into the collective bargaining agreement shoes of CMSH, holding itself out in all respects as the CMSH entity signatory with the Carpenters. CMSH Framing went as far as to utilize the apprenticeship program in 1981, during the time the companies were in negotiations with the Carpenters Union, and routinely made fringe benefit payments to the Pension Fund, returning contribution report forms addressed to CMSH, making the payments on CMSH Framing checks. After CMSH Framing began operating, in the summer of 1978, it performed all the carpentry work for CMSH previously performed by the original entity.

4. Common Ownership and Financial Control.

Similarly, there was significant common ownership and financial control. Crouse and Hagood owned 100% of CMSH and 55% of CMSH Framing. CMSH provided a working capital advance in the form of an interest-free $100,000 loan to set up CMSH Framing in business. There was no indication in the financial records that CMSH Framing ever made payments on the $100,000 advance or that CMSH ever made an effort to call the note.

Based on the law of the Ninth Circuit,[14] prior to the instant case, a disguised continuance between two entities, without a requirement of intent, was sufficient for a finding of alter ego status. As for CMSH and CMSH Framing, the "disguise" occurred in a slight name change and the placement of Stiles as a partial owner and officer

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[14] See Footnote 8.

of CMSH Framing. The "continuance" can be seen in every aspect of the businesses. There was substantially the same ownership. Crouse negotiated the collective bargaining agreement for CMSH and CMSH Framing stepped into their shoes—hiring employees, making pension payments, using the apprenticeship program. CMSH provided an interest free start up loan of $100,000 to CMSH Framing with no obligation to pay it back. Thus, the disguised continuance test is met.

II. THE NINTH CIRCUIT DECISION UNDERMINES THE MPPAA WITHDRAWAL LIABILITY PROVISIONS WHICH WERE DESIGNED TO PROTECT MULTIEMPLOYER PLANS.

In 1974, Congress enacted the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, to ensure that employees and their dependents would not be deprived of anticipated retirement benefits because of the termination of pension plans which lack sufficient funds to cover vested benefits. *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361-362, 374-375 (1980); *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 476 U.S. 717, 720 (1984). A plan termination insurance program, administered by the Pension Benefit Guaranty Corp. (PBGC) a wholly owned governmental corporation within the Department of Labor, was established for the purpose of collecting premiums from covered pension plans in order to provide sufficient assets. *See* 29 U.S.C. § 1332, 1361. Pension plans maintained by single employers were backed by the PBGC when ERISA was enacted in 1974.

Between 1974 and 1978, Congress became aware and concerned about a significant number of multiemployer plans experiencing financial hardship where guaranteed pension benefits were in jeopardy. *R. A. Gray & Company, supra* at 606. The PBGC was directed to prepare

a comprehensive report analyzing the problems faced by these plans and recommending legislative action. *See* S. Rep., 95-570 pages 1-4 (1977) and H.R. Rep., 95-706 page 1 (1977).

The PBGC issued its report on July 1, 1978, concluding that ERISA did not adequately protect pension plans from the adverse consequences which resulted when individual employers withdrew from multiemployer plans. The report stated that following:

> The basic problem with the withdrawal rules is that they are designed primarily to protect PBGC. They do not provide an efficient mechanism for reducing the burden of withdrawal on the plan and remaining employers. They may even encourage withdrawals in some instances (e.g., where termination may be imminent). Changes in the withdrawal rules should be considered:
>
> (1) To provide relief to plans without increasing the burden on the insurance system,
>
> (2) To provide a disincentive to voluntary employer withdrawals,
>
> (3) To reduce or remove disincentives to plan entry, and
>
> (4) To work with, instead of against, the termination liability provisions. Pension Benefit Guaranty Corp., multiemployer study required by PL 96-214 (1978); *R. A. Gray & Company, supra* at 722.

The executive director of the PBGC explained the following concern of the government corporation:

> "A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and

> higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever decreasing contribution base. This vicious downwards spiral may continue until it is no longer reasonable or possible for the pension plan to continue." Pension Plan Termination Insurance Issues: hearings before sub-committee on oversight of the House Committee on Ways and Means, 95th Cong., 2d Sess. 22 (1978) (Statement of Matthew M. Lind).

The PBGC report suggested that a withdrawing employer ". . . be required to complete funding its fair share of the plan's unfunded liabilities." 1978 Hearings at p. 23.

Congress ultimately agreed with the PBGC analysis and report and responded with a legislative effort now known as MPPAA (the Multiemployer Pension Plan Amendment Act of 1980).

> As enacted, the Act requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's "unfunded vested benefits," calculated as the difference between the present value of the vested benefits and the current value of the plan's assets. *R. A. Gray & Co., supra* at 725.

While Congress provided that a withdrawal from a multiemployer plan occurs when the employer permanently ceases to have an obligation to contribute to the plan or permanently ceases all covered operations under the plan, special consideration was given to the building and construction industry. 29 U.S.C. § 1383(a), (b). A complete withdrawal in the construction industry was deemed to have occurred where (1) substantially all of the employees whom the employer had an obligation to

contribute under the plan performed work in the building and construction industry, (2) the plan primarily covered employees in that industry and the plan so indicated, (3) the employer ceased to have an obligation to contribute under the plan, and (4) the employer "continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or resumed such work within five years after the date on which the obligation to contribute under the plan ceases . . ." 29 U.S.C. § 1383(b).

The House Report, No. 95-869 part I, submitted with the MPPAA legislation, explained why the withdrawal liability provisions applicable to the building and construction industry appeared as it did:

> In the construction industry, the funding base of the plan is the construction projects in the area covered by the collective bargaining agreements through which the plan is maintained. An individual employee will typically work for tens or even hundreds of different employers over his or her working career, and the volume of work for a given employer will often fluctuate greatly from year to year. These normal events do not pose an undue threat to a plan as long as contributions are made for whatever work is done in the area. Therefore, the construction industry exception is designed to impose liability only on former contributors who continue to work within the plan's area. It exempts from liability employers who cease contributions because they have no work in the area; there is no liability when a company goes out of business, or simply without work for a time. Also, under this exception, an employer who comes into an area to do one project and then leaves would not be subject to liability. (H.R. Rep., *supra* at pp. 75-76, U.S. Code Congressional and Administrative News (1980) P.L. 96-364 pp. 2943-2944).

So strong was the legislative mandate that multiemployer pension plan participants be protected, that the

Supreme Court unanimously upheld the constitutionality of the retroactive application of MPPAA to a construction industry employer in *R. A. Gray & Co., supra*, and subsequently upheld the MPPAA withdrawal liability provisions in the face of a Fifth Amendment, Taking clause, challenge leveled by a construction industry multiemployer pension plan in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986).

For all purposes, CMSH and CMSH Framing were the same employer. CMSH Framing was the disguised continuance of CMSH, as discussed above. For purposes of the collective bargaining agreement, CMSH and CMSH Framing were one operation. CMSH Framing adopted the collective bargaining agreement of CMSH. CMSH Framing stepped into the shoes of CMSH, employing carpenters under the terms of the collective bargaining agreement, utilizing the apprenticeship program, making appropriate payments to the benefit funds.

CMSH Framing was dissolved in September, 1986 and a withdrawal liability assessment against CMSH and CMSH Framing was issued in January, 1988 for $229,170.

If the Ninth Circuit decision stands and CMSH and CMSH Framing are not a single employer for withdrawal liability purposes, the purpose of the MPPAA withdrawal liability provisions are undermined. The MPPAA was enacted, in part, to protect pension funds from incurring unfunded vested liabilities. The MPPAA met this goal by requiring employers withdrawing from multiemployer pension plans to pay to the pension plans a sum representing the employers proportionate share of the plans' unfunded vested liabilities. In this case, the withdrawal liability assessment was $229,170.

If this money is not collected in withdrawal liability and paid into the fund, the fund remains liable for these vested benefits. The liability is absorbed back

into the fund and remaining employers have to increase their contributions to the existing pension plan to increase the plan's contribution base. The contribution rate for remaining employers increases to fund this inherited or past service liability. This rising cost may encourage other withdrawals, leading to another increase in costs and to an eventual downward spiral in the vitality of such a plan. It was this scenario the MPPAA's withdrawal liability was meant to address and discourage.

The Ninth Circuit decision does damage to Congress' scheme, reflected in the MPPAA, to protect the pensions of multiemployer plan participants. Treating two entities as a single employer for all purposes other than withdrawal liability fosters the erosion of multiemployer plan funding bases by encouraging the creation of new entities and subsequent withdrawals. This is an important question of federal law which this Court should address to protect the integrity of multiemployer pension plans.

CONCLUSION

For the reasons suggested above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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DATED: June 18, 1992

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-15646

D.C. No. CV-90-0116-JPV

CMSH COMPANY, INC.; CMSH FRAMING,
Plaintiffs-Appellants,

v.

CARPENTERS TRUST FUND FOR NORTHERN CALIFORNIA,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, Jr., District Judge, Presiding

Argued and Submitted
June 12, 1991—San Francisco, California

Filed April 28, 1992

Before: Proctor Hug, Jr., Mary M. Schroeder, and Charles Wiggins, Circuit Judges.

Mark H. Lipton, Lipton & Lipton, San Ramon, California, and William Morgan Bennett, San Francisco, California, for the plaintiff-appellants.

Robert M. Hirsch, Van Bourg, Weinberg, Roger & Rosenfeld, San Francisco, California, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

OVERVIEW

CMSH Company, Inc. (CMSH) and CMSH Framing (Framing) appeal a district court order upholding an arbitration award in favor of Carpenters Pension Trust Fund (Fund) for withdrawal liability under the Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1381(a) (1988). The arbitrator found that the appellant corporations were alter egos and that CMSH was therefore responsible for the liability incurred when Framing withdrew from its ERISA pension plan. The district court affirmed the arbitrator's judgment. CMSH argues on appeal that it is not responsible for Framing's independent withdrawal liability. This court has jurisdiction over CMSH's timely appeal pursuant to 28 U.S.C. § 1291 (1988). We reverse.

BACKGROUND

CMSH, a California Corporation, was founded in 1972 as a licensed California contractor. In June 1974, William Crouse, the president of CMSH, signed a collective bargaining agreement with Carpenters 46 Northern California Counties Conference Board (Carpenters). The initial three-year agreement ended in June 1977, and the contract was renewed for another three-year period, 1977-80. CMSH employed workers and made payments to the Fund under the terms of the bargaining agreement from 1974 until mid-1978. Crouse and Robert Hagood were the sole owners of CMSH, each owning 50%.

On July 11, 1978, Framing was incorporated in California as a licensed contractor. Although there was an

overlap of ownership betwen CMSH and Framing, ownership was not identical. Crouse and Hagwood each owned 27.5% of Framing, but Michael Stiles, the president of Framing, owned the remaining 45% and was therefore the biggest Framing shareholder. Framing took over CMSH's operations under the collective bargaining agreement with Carpenters.

Framing did not enter a new agreement with Carpenters but instead hired workers under the terms and conditions of the old bargaining agreement negotiated by CMSH. This agreement expired on June 15, 1980, and Framing attempted to negotiate a new agreement with Carpenters. Framing continued to employ workers and contribute to the Fund until October 1982, when it reached an impasse in negotiations with Carpenters.

Framing had its own contractor's license, bond, and bank accounts, and all checks made out to the Fund after mid-1978 were drawn from Framing's independent bank accounts. Additionally, Framing operated independently and primarily performed work for employers unrelated to CMSH. Between 1978 and 1982, approximately ninety percent of Framing's work was for employers other than CMSH.

However, all negotiations between Carpenters and Framing, like the negotiations between Carpenters and CMSH, were conducted by Crouse, the president of CMSH and the vice-president of Framing. Stiles, the president of Framing, was never directly involved with the negotiations. Moreover, an employee of both CMSH and Framing handled the contribution report forms submitted to the Fund. Indeed, it appears that Carpenters never recognized CMSH and Framing as separate corporations.

After Framing was dissolved on September 30, 1986, the Fund notified CMSH and Framing of a withdrawal liability assessment of $229,170 pursuant to 29 U.S.C. section 1381(a). The Fund treated CMSH and Framing

as one employer for purposes of the liability. By order of the district court, the liability issue was submitted to an arbitrator. The arbitrator determined that CMSH and Framing were alter egos and jointly responsible for the withdrawal liability. On April 25, 1990, the district court upheld the arbitrator's judgment. This appeal followed. The appellants' only argument on appeal involves the liability of CMSH; they do not contest the independent withdrawal liability of Framing.

DISCUSSION

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. §§ 1381-1453 (1988), amended ERISA to include mandatory liability on employers withdrawing from established pension plans. *See Board of Trustees of the W. Conf. of Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892, 893 (9th Cir. 1988); *Connors v. Ryan's Coal Co.*, 923 F.2d 1461, 1462-63 (11th Cir. 1991). In the event of a dispute over employer withdrawal liability, the MPPAA mandates arbitration proceedings. 29 U.S.C. § 1401(a) (1988).

In this case, the arbitrator awarded and the district court affirmed withdrawal liability against both CMSH and Framing in the amount of $229,170. The arbitrator's factor findings are presumed correct, and the presumption is "rebuttable only by a clear preponderance of the evidence." 29 U.S.C. § 1401(c); *see Trustees of the Amalgamated Ins. Fund v. Geltman Indus.*, 784 F.2d 926, 929 (9th Cir.), *cert. denied*, 479 U.S. 822 (1986). The arbitrator's conclusions of law are reviewed de novo. *Geltman*, 784 F.2d at 929 (citing *Board of Trustees v. Thompson Bldg. Materials*, 749 F.2d 1396, 1405-06 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985)).

CMSH makes two primary arguments on appeal. First, it contends that the arbitrator erred in determining that CMSH and Framing are jointly liable under the MPPAA for the assessed withdrawal liability. Second,

CMSH contends that the dismissal with prejudice of a California case brought by the Fund in 1989 against CMSH bars the Fund's withdrawal liability claim under the doctrine of res judicata. Because we agree with CMSH's first argument that alter ego principles were inapplicable in this case, we reach no conclusion on CMSH's res judicata argument.

I. *CMSH's Withdrawal Liability*

The central issue on appeal is the arbitrator's legal conclusion that CMSH and Framing are jointly liable for withdrawal liability purposes. Framing replaced CMSH as the employer more than two years before the MPPAA was enacted, and CMSH had ceased all covered operations and had stopped making pension contributions by the time its 1977-80 contract with Carpenters had expired. The termination of the contract marked CMSH's complete withdrawal from the plan, and the independent withdrawal date for CMSH is June 15, 1980, the date the 1977-80 contract terminated. Thus, if the corporations are independent entities, CMSH has no withdrawal liability under the MPPAA because employers who withdrew from pension funds prior to September 26, 1980 have no MPPAA withdrawal liability. *See* 29 U.S.C. § 1461(e)(1)-(2); *Woodward Sand Co. v. Western Conf. of Teamsters Pension Trust Fund*, 789 F.2d 691, 694 (9th Cir. 1986).

Framing does not dispute that it incurred withdrawal liability. However, because Framing replaced CMSH as the employer and CMSH ceased all covered operations prior to the effective date of the MPPAA, CMSH is liable only if it and Framing are treated as the same corporation. *See Teamsters Pension Trust Fund v. Central Mich. Trucking*, 698 F. Supp. 698, 700-03 (W.D. Mich. 1987) (a predecessor employer does not incur liability for the subsequent withdrawal of the successor employer), *aff'd*, 857 F.2d 1107 (6th Cir. 1988).

We begin by reviewing the statutes and regulations that determine whether two corporations can be treated as one for purposes of assigning MPPAA withdrawal liability. By its terms, the MPPAA applies to businesses (whether or not incorporated) which are under *common control* shall be treated as employed by a single employer and all such trades or businesses as a single employer." 29 U.S.C. § 1301(b)(1) (1988) (emphasis added). The term "businesses under common control" is defined by regulations coextensive with the regulations under 26 U.S.C. § 414(c) which in turn define common control according to 26 U.S.C. § 1563(a). *See* 29 U.S.C. § 1301(b)(1), 26 U.S.C. § 414(b)-(c); *Pension Benefit Guar. Corp. v. Ouimet Corp.*, 630 F.2d 4, 10-11 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981).

"Businesses under common control" include "brother-sister" groups of corporations, as that term is defined:

> The term "brother-sister group of trades or businesses under common control" means two or more organizations conducting trades or businesses if (i) the same five or fewer persons who are individuals, estates, or trusts own (directly and with the application of § 1.414(c)-(4) a *controlling interest* in each organization, and (ii) taking into account the ownership of each such person only to the extent such ownership is identical with respect to each such organization, such persons are in effective control of each organization.

26 C.F.R. § 1.414(c)-2(c)(1) (1991) (emphasis added); *see also* 26 U.S.C. § 1563(a)(2) (1988); *Lafrenz*, 837 F.2d at 893. Thus, the same group of individuals must have a "controlling interest" in both corporations for the corporations to be a brother-sister group. The regulations define "controlling interest" as follows:

> In the case of an organization which is a corporation, ownership of stock possessing at least 80 percent of

> total combined voting power of all classes of stock entitled to vote of such corporation or at least 80 percent of the total value of shares of all classes of stock of such corporation;

26 C.F.R. § 1.414(c)-2(b)(2)(A).

Both CMSH and the Fund rely on these provisions. However, by claiming that CMSH and Framing constitute a brother-sister group under the regulations, the Fund misreads the regulations. The ownership structure of the corporations establishes that they are not brother-sister businesses. The same five or fewer persons do not have a controlling interest in both CMSH and Framing; Crouse and Hagood, while owning 100% of CMSH, owned only 55% of Framing. A controlling interest is 80%, and Crouse and Hagood's ownership of Framing is well below that level.

Stiles' ownership in Framing is irrelevant for calculating controlling interest because he does not have any ownership in CMSH. *See* § 1.414(c)-2(e) (example (4)). Apparently, the Fund's misunderstanding and misapplication of the regulations stems from its failure to recognize that "a person's stock ownership is not taken into account for purposes of the 80% control test unless that person owns stock in each corporation of the putative brother-sister group." 53 Fed. Reg. 6603 (Mar. 2, 1988) (discussing regulations promulgated under ERISA). Because Stiles does not own stock in both Framing and CMSH, his stock ownership in Framing cannot be considered for purposes of the controlling interest test.

The Fund's interpretation of ERISA's common control requirement was squarely rejected by the Supreme Court in *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982). In *Vogel Fertilizer*, the Court held that a person's stock ownership cannot be taken into account for the purposes of section 1563(a)'s 80% control requirement unless that person owns stock in each corporation

of the brother-sister group. Because Congress used section 1563(a)'s 80% control test for ERISA common control purposes, the Fund is bound in this case by the *Vogel Fertilizer* precedent. Indeed, the applicable regulations follow *Vogel Fertilizer* and make clear that CMSH and Framing are not a brother-sister group. *See* 26 C.F.R. § 1.414(c)-2(b)(2)(A), (c)(1), (e).

Neither the arbitrator nor the district court addressed *Vogel Fertilizer* or the provisions mandated by Congress. Without analyzing the applicable common control provisions, the arbitrator applied an alter ego theory based on this court's decision in *J.M. Tanaka Const. v. N.L.R.B.*, 675 F.2d 1029, 1033-35 (9th Cir. 1982). Although the alter ego doctrine is recognized generally in the labor law context, *see id.* (alter ego corporation bound to preexisting collective bargaining agreement); *Haley & Haley, Inc. v. N.L.R.B.*, 880 F.2d 1147, 1149-52 (9th Cir. 1989) (same), the arbitrator and district court erred in applying the alter ego doctrine.

Alter ego analysis like that applied in *Tanaka* does not impose liability for a statutory obligation that did not exist at the time the alter ego entity was formed. The alter ego doctrine from *Tanaka* only applies when the alter ego is formed to avoid a preexisting duty. *Cf. Haley & Haley*, 880 F.2d at 1149 ("the alter ego transfer is in essence a sham transaction, motivated by the employer's desire to avoid its contractual obligations"); *Audit Servs. v. Rolfson*, 641 F.2d 757, 764 (9th Cir. 1981) (before piercing the corporate veil in an action to recover fringe benefit fund payments, a court must find that an alter ego corporation was formed with "fraudulent intent" to avoid a duty to make payments).

In *Tanaka*, the J.M. Tanaka Construction Company had a preexisting duty to make fringe benefit payments to the union under a collective bargaining agreement. After J.M. Tanaka fell behind on its payments to the union, it ceased operations, and R.M. Tanaka Construc-

tion was formed to replace J.M. Tanaka. R.M. Tanaka "was created for the purpose of eliminating the high cost of dealing with the union" and continued operations without making the payments to the union mandated by the collective bargaining agreement. *Id.* at 1035. In the absence of any federal statute governing such a situation, this court held that R.M. Tanaka retained J.M. Tanaka's pre-existing duty to make fringe benefit payments under the collective bargaining agreement because the two companies were alter egos.

In the present case, CMSH never had a duty to make a withdrawal payment. As discussed above, CMSH incurred no independent withdrawal liability because it withdrew from the pension plan before the MPPAA was passed on September 26, 1980. CMSH ceased operations covered under the plan in mid-1978 and terminated any obligations under the collective bargaining agreement when the agreement expired on June 15, 1980.

When Framing took over CMSH's operations, pursuant to *Tanaka*, it also assumed CMSH's preexisting duty to make payments under the collective bargaining agreement. Framing was not charged with the duty to make a withdrawal payment, however, until after the MPPAA was enacted. Moreover, Framing's duty under *Tanaka* to make the payments required by the collective bargaining agreement ceased to exist when the agreement expired.

Thus, when the collective bargaining agreement expired on June 15, 1980, neither CMSH nor Framing was bound by any collective bargaining agreement or had any obligation to make pension payments. Any obligations incurred after that point were incurred by Framing alone. Even if CMSH could be held liable for pension payment obligations Framing incurred after the collective bargaining agreement expired,[1] CMSH cannot be held liable

[1] Actually, neither Framing nor CMSH was liable for pension payments under ERISA because Framing made the required pay-

for Framing's withdrawal liability. CMSH never had any withdrawal liability, and the creation of Framing was not an attempt to avoid a preexisting duty.

Interestingly, the Fund itself supports this analysis by arguing that the statutory duty to make a lump sum withdrawal payment must be viewed separately from the obligation to make pension payments under the collective bargaining agreement. In its attempt to avoid res judicata, the Fund admits that CMSH's obligations pursuant to the collective bargaining agreement do not necessarily extend to any withdrawal liability obligation. Thus, even if CMSH were laible for Framing's contractual obligations under *Tanaka*, CMSH is not liable for Framing's statutory withdrawal liability.

In sum, the alter ego doctrine from *Tanaka* is inapplicable unless the alter ego is formed to evade a preexisting duty. Because CMSH and Framing are not a brother-sister group under the regulations governing ERISA common control analysis, CMSH is not responsible for Framing's withdrawal liability. We therefore reverse the district court's decision on this issue.

II. *Claim Preclusion*

On November 4, 1987, Carpenters filed suit against CMSH in Superior Court of California based on the terms of its collective bargaining agreement. The California action sought an injunction to compel an audit and contributions allegedly owed by CMSH from 1981 through 1983. In March 1989, the action was dismissed with prejudice when Carpenters determined that CMSH had filed a timely termination notice in the Spring of 1980.

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ments until negotiations over a new agreement reached an impasse. *See Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 545-51 (1988) (there is no ERISA action to collect pension payments if a contact has expired and negotiations have reached an impasse).

CMSH now argues that the dismissal of the California action constitutes res judicata in the instant suit and thereby precludes Carpenters from asserting withdrawal liability.

Although CMSH's res judicata arguments have some merit, we do not address them. Given our decision on the merits of CMSH's federal law argument, an application of California law to resolve the res judicata issue is unnecessary.

CONCLUSION

Because CMSH and Framing may not be treated as the same entity for purposes of ERISA withdrawal liability, CMSH is not liable for Framing's ERISA withdrawal liability. Therefore, we REVERSE the decision of the district court.

REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-90-0116 JPV

CMSH COMPANY, INC.; CMSH FRAMING,
Petitioners,

—v—

CARPENTERS PENSION TRUST FUND FOR
NORTHERN CALIFORNIA,
Respondent.

ORDER DENYING PETITIONER'S MOTION TO VACATE ARBITRATION AWARD

[Filed Apr. 10, 1990]

INTRODUCTION

Petitioners' Motion to Vacate Arbitration Award was scheduled to be heard on April 5, 1990. After a review of the briefs, this court considered it appropriate to submit the motion on the pleadings pursuant to Local Rule 220-1, and now *DENIES* the motion.

DISCUSSION

On May 12, 1989, Petitioners and Respondent were ordered to arbitrate a withdrawal liability claim alleged by Respondent. On December 18, 1989, Arbitrator Gerald

R. McKay found that CMSH and CMSH Framing should be treated as one company under the doctrine of alter ego. Arbitrator McKay found that CMSH incurred withdrawal liability under the Multi-Employer Pension Plan Amendment Act of 1980 ("MPPAA"). 29 U.S.C. § 1381-1453.

On January 12, 1990, Petitioners filed a Petition to Vacate Arbitration Award and Enter Judgment for Petitioners, and, on February 15, 1990, Respondent filed a Cross-Petition for Confirmation of Arbitration Award. Under 29 U.S.C. § 1401(c), "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." This court has read Arbitrator McKay's Arbitration Award, Petitioners' briefs, Respondent's briefs, applicable case law, and the applicable statutes cited by both parties. Petitioners have failed to persuade this court that the arbitrator's findings of fact are incorrect by a "clear preponderance" of evidence. Therefore, Arbitrator McKay's December 18, 1989 arbitration award is upheld.

CONCLUSION

Petitioners' Petition to Vacate Arbitration Award is *DENIED*.

IT IS SO ORDERED

DATED: Apr. 10, 1990

/s/ J. P. Vukasin, Jr.
J.P. VUKASIN, JR.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C-90-0116

CMSH COMPANY, INC.; CMSH FRAMING,
Petitioners,

vs.

CARPENTERS PENSION TRUST FUND
NORTHERN CALIFORNIA,
Respondents.

JUDGMENT

PURSUANT TO THE COURTS' ORDER of April 10, 1990, denying Petitioners' Motion to Vacate Arbitration Award.

JUDGMENT is hereby entered in favor of Respondents and against Petitioners, and the arbitrators' award is affirmed.

DATED: Apr 25, 1990

/s/ J. P. Vukasin, Jr.
J.P. VUKASIN, JR.
United States District Court

APPENDIX D

A MATTER IN ARBITRATION

In a Matter Between: CARPENTER TRUST FUND FOR NORTHERN CALIFORNIA,

(Fund)

and

CMSH COMPANY, INC., and CMSH FRAMING,

(Employer)

Grievance: Withdrawal Liability

Hearing: September 1, 1989

Award: December 18, 1989

DECISION AND AWARD

GERALD R. MCKAY, Arbitrator

STATEMENT OF PROCEDURE

This matter arises as the result of an order from the United States District Court, Northern District of California mandating the above Trust and the above Employer to submit their dispute with respect to the Employer's potential withdrawal liability to arbitration.[1] This arbitrator was selected by the mutual agreement of the parties to hear and resolve the dispute. A hearing was held in Oakland, California on September 1, 1989.

[1] Exhibit #C1.

During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties submitted briefs and reply briefs in argument of their respective positions. The arbitrator received those briefs on or about October 24, 1989. Subsequent to the submission of reply briefs, the Employer sent a reply letter which was answered by the Fund. The record was complete on or about November 1, 1989. Having had an opporunity to review the record, the arbitrator is prepared to issue his decision.

ISSUES

1. Should CMSH Framing and CMSH Company, Inc. be treated as one company for purposes of withdrawal liability? If so, what is the withdrawal date of the one company? If not, what are the withdrawal dates of the separate companies?

2. Did either CMSH or CMSH Framing withdraw as defined in MPPAA from the Carpenters Pension Trust Fund of Northern California prior to the effective date of the MPPAA withdrawal liability provisions?

3. Was the dismissal with prejudice in Superior Court Case 883733 as to CMSH Company and CMSH Framing res judicata or collateral estoppel as to these arbitration proceedings? [2]

BACKGROUND

CMSH Company, Inc. was established as a California Corporation in September, 1972 and operated as a licensed California Contractor from that day forward.[3] In June, 1974, Mr. William Crouse, the president of CMSH Company, Inc. (CMSH), signed a collective bargaining Agree-

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[2] Tr. Pages 9 and 10. In its opening brief, the Employer stated five separate issues. None of those issues as stated by the Employer were submitted to the arbitrator by mutual agreement.

[3] Exhibit C2.

ment with the Carpenters 46 Northern California Counties Conference Board (Carpenters). CMSH employed carpenters under the terms of the Carpenters' Master Agreement from 1974 until mid-1978 when it discontinued hiring carpenters directly. On July 11, 1978, CMSH Framing was incorporated as a California Corporation with a separate contractor's license. CMSH Framing did not sign a collective bargaining Agreement with the carpenters but hired carpenters under the terms and conditions of the contract which existed between CMSH and the carpenters. CMSH Framing continued to hire carpenters and make contributions to the Carpenters Pension Fund until October 1982 when it reached an impasse in negotiations with the carpenters. CMSH Framing was dissolved on September 30, 1986.

In a notice dated January 14, 1988, the Carpenters Pension Fund notified CMSH and CMSH Framing of a withdrawal liability assessment totaling $229,170. The Carpenters Pension Fund treated CMSH and CMSH Framing as one Employer. CMSH has asserted in this dispute that it withdrew from its contractual obligation with the Carpenters on or about June 15, 1980 and has no withdrawal liability under MPPAA. Furthermore, CMSH asserts that CMSH Framing is a separate corporate entity for which CMSH is not responsible. If any responsibility exists, according to CMSH, it only exists for work performed by CMSH Framing directly for CMSH and not for other employers. It is the Fund's position that CMSH and CMSH Framing are alter egos and should be treated as one corporate entity for purposes of withdrawal liability.

Mr. William Crouse has a fifty percent ownership interest in CMSH. The other fifty percent is owned by Robert Hagood. Mr. Crouse and Mr. Hagood each own a 27.5 percent interest in CMSH Framing. Mr. Michael Stiles owns a 45 percent interest in CMSH Framing. Mr. Stiles worked as the foreman for CMSH responsible

for supervising the jobs on which CMSH worked and for hiring employees to perform work on those jobs. Mr. Stiles continued this activity with CMSH Framing, hiring the carpenters and laborers.

On February 28, 1980, Mr. Crouse sent a letter to the Carpenters notifying them that CMSH had separated into several affiliated corporations. These corporations were identified as CMSH Framing, CMSH Electrical and CMSH Heating and Air Conditioning as well as CMSH Company, Inc. In the letter, Mr. Crouse informed the Carpenters that, "These individual corporations shall separately negotiate their own union contracts and be responsible for their own benefits. They will also be established at different addresses." Further on, Mr. Crouse told the Carpenters that CMSH and CMSH Framing had ". . . withdrawn all powers of attorney given to any organization authorizing them to represent said firms."[4] This letter was sent on CMSH letterhead with an address of 4874 Pasadena Avenue, Sacramento, California and with a telephone of 481-3922.

On June 25, 1980, Mr. Crouse sent a letter to the Carpenters on CMSH Framing letterhead listing the address as 4866 Pasadena Avenue, Sacramento, California and listing the telephone number as 481-3922. In this letter, Mr. Crouse informed the Union that CMSH Framing was notfiying it that the Union was violating several sections of the National Labor Relations Act. In the letter, Mr. Crouse stated, "CMSH asked for fair bargaining prior to June 16, 1980, in order to work out the new contract, and the Union did not respond." Subsequent to sending this letter, Mr. Crouse did meet with the Union on several occasions to negotiate a new contract. These negotiations occurred between July, 1980 and 1982. At the first meeting, Mr. Crouse testified, Warren Stevens, and perhaps a business agent, were present representing

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[4] Exhibit #C2(A1).

the Union. For the Employer, Mr. Crouse was present, along with his partner, Bob Hagood. Mr. Crouse acted as the spokesperson for the Employer.[5] There is no evidence in the record that Mr. Stiles ever participated in negotiations with the Carpenters, either on behalf of CMSH or CMSH Framing. All of the negotiations between CMSH or CMSH Framing and the Carpenters was done by Mr. Crouse.

In a letter dated January 20, 1981 on CMSH Framing letterhead, Anne Rone, an office employee who worked for both CMSH Framing and CMSH, sent a letter to the Carpenters in which she indicated that Michael Stiles' December statement from the Carpenters showed that no contributions were made on his behalf for October, 1980. Ms. Rone stated, "Several of our other employees have also told us that their statements show no October contribution." The records to which Ms. Rone was making reference indicated that Mr. Stiles was working as a carpenter and was having contributions made on his behalf to the Carpenters' fund. Most of the reports prepared by the Carpenters' funds showing employee contribuitons list Mr. Stiles as an employee on whom contributions were being made. Neither Mr. Bob Hagood nor Mr. Crouse are listed on any of the forms showing them as employees on whose behalf contributions were made to the Carpenters' funds.[6] On all of the fund reports, the documents are addressed to CMSH Company, Inc. at 4874 Pasadena Avenue. In every case, the amount claimed by the funds from CMSH was paid by a check in the name of CMSH Framing.

On February 18, 1981, Mr. Crouse sent a letter on CMSH letterhead to Mr. Warren O. Stevens in the Sacramento area District Council of Carpenters' office. In this letter, Mr. Crouse stated, among other things, "We re-

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[5] Tr. Page 31.

[6] Joint Exhibit #E.

ceived your letter of February 12, 1981, and would be happy to meet with you to discuss the Carpenter Agreement." Mr. Crouse went on in the letter to state, "As you might recall, we did meet on July 24, 1980 and negotiated some of the terms of the Contract." There is no indication in this letter that Mr. Crouse informed the Carpenters that he was negotiating the terms of a new contract on behalf of CMSH Framing rather than on behalf of CMSH. In his testimony during the hearing, Mr. Crouse indicated that after sending the Carpenters a letter dated June 25, 1980 on CMSH Framing letterhead, he commenced negotiations. The record indicates that there was only one set of negotiations which took place between Mr. Crouse and the Carpenters. There were not separate negotiations on behalf of CMSH Framing and CMSH.

In 1981, CMSH Framing utilized the Carpenters Apprenticeship Training Program and employed indentured apprentices under the Carpenters' program which is certified by the Division of Apprenticeship Standards for the State of California. On August 18, the Department of Industrial Relations notified CMSH Framing that it was certifying registration of eight apprentices. The Trust Agreement requires that employers utilizing the benefits of the apprenticeship trust be signatory to a Carpenters' contract or execute a copy of the Trust Agreement in writing and deposit it with the Board of Trustees. There is nothing in the record which would indicate that CMSH Framing ever executed a Trust Agreement for the Apprenticeship Trust.

When CMSH Framing was founded, it received its capital investment from CMSH in the form of a non-interesting bearing note in the amount of $100,000. There is no indication in the financial records which are part of the record that CMSH Framing ever made payments on the $100,000 advance or that CMSH ever made an effort to call the note. In the financial statement for

1982, the note appears to have acquired a nine percent interest rate which does not appear prior in the financial records. However, there was no anticipated calling of the note in 1982, nor is there any indication that any monies were paid from CMSH Framing to CMSH in an effort to reduce the note.

POSITION OF THE PARTIES

FUND

The Fund argued that CMSH and CMSH Framing were properly treated as one company for withdrawal liability purposes by the Carpenters' pension fund. The Fund noted that it is not attempting to assess withdrawal liability against a non-signatory, non-contributing entity which is part of a commonly controlled group. Instead, it is attempting to collect withdrawal liability from CMSH which has an alter ego CMSH Framing. There are four criteria which must be considered in determining whether businesses are alter egos. First, is there centralized control of labor relations? Second, is there common management? Third, is there interrelation of operations? And, four, is there common ownership and financial control? No one factor is controlling, and all factors need not be present. When these factors are applied in the present case, it is clear that CMSH Framing is the alter ego of CMSH. There was common control of labor relations; there was common management; there was an interrelation of operations, and there was common ownership and financial control. If alter ego was not sufficient, CMSH Framing and CMSH must be treated as a single employer because CMSH Framing voluntarily adopted the collective bargaining Agreement of CMSH. Having held itself out as the CMSH Company with whom the Carpenters' Union had a collective bargaining Agreement, the Fund properly treated the entities as a single employer when it withdrew from participation in the pension plan. To conclude otherwise would be to permit the Employer to act as a single entity

for all purposes other than the funding of its share of the vested unfunded pension of affected carpenters.

The date of impasse with the Employer marked the date of withdrawal from the Carpenters' Pension Fund. CMSH Framing ceased making contributions to the fund in October, 1982 when an impasse in negotiations was reached with the Carpenters. CMSH remained obligated to contribute to the pension fund during the periods when negotiations were ongoing, but an impasse had not been reached. The impasse date is the date when the obligation to contribute ceased and when withdrawal liability was triggered under MPPAA. Even if the two companies were not treated as a single entity, the impasse in negotiations would stand as the withdrawal date for purposes of withdrawal liability assessment.[7] Neither the doctrines of res judicata nor collateral estoppel bar the Fund from collecting the unpaid withdrawal liability. The 1987 Fund suit against William Crouse and CMSH Company, Inc. was brought pursuant to the terms of the collective bargaining and Trust Agreements to collect unpaid contributions on behalf of the employees who worked for CMSH. The suit did not involve a claim of withdrawal liability because the Fund had not determined at that point that withdrawal liability was appropriate and owning by CMSH. Withdrawal liabiilty issues currently raised in this arbitration were not and could not have been raised previously, therefore, they cannot be barred by res judicata or collateral estoppel.

EMPLOYER

Withdrawals that took place prior to September, 1980 do not subject the withdrawing employer to withdrawal liability under the MPPAA provisions. CMSH clearly withdrew as defined under MPPAA prior to September

[7] The Fund uses both February, 1982 and October, 1982 as the date when the impasse was reached in negotiations. The arbitrator believes that October, 1982 is the correct date.

1, 1980. Because the 1977-1980 collective bargaining Agreement was a pre-hire Agreement, all obligations of CMSH to contribute to the pension fund terminated in June of 1980. At no time did the Carpenters ever transform the 8(f) Agreement it had with CMSH into the 9(a) Agreement. Whether or not the 1977-80 Agreement was a pre-hire Agreement, CMSH had no obligation to contribute as defined in MPPAA after its termination. Withdrawal takes place under MPPAA when the collective bargaining Agreement terminates and not when impasse is reached on subsequent negotiations that fail to result in a new collective bargaining Agreement. If CMSH withdrew in June, 1983, its liability would be limited only to the work it subcontracted to CMSH Framing and not to the additional work performed by CMSH Framing for other Contractors. Withdrawal liability is calculated on the basis of total contributions made by the Employer during the five years prior to withdrawal which serves as a numerator for a fraction which has as its denominator total contributions made to the Fund by all employers during the same five-year period. The Fund in the present case has used as a numerator total contributions made by CMSH Framing instead of simply those contributions made by CMSH Framing on behalf of work performed for CMSH.

CMSH is a separate legal entity from CMSH Framing and has no liability for any obligation CMSH Framing might otherwise have to the Carpenters' Pension Trust fund. There simply is not enough evidence to support an alter ego theory, even if one would be allowed under MPPAA. No case or argument has been made which would excuse or allow a deviation from the statutory definition of controlled corporation which is part of the statutory scheme created by MPPAA. It is the common control in the statute which is controlling and not any theory of alter ego which may exist. CMSH and CMSH Framing do not meet the definition of brother/sister control corporations.

A dismissal with prejudice is tantamount to a judgment on the merits having res judicata effect as well as collateral estoppel application. Judgments rendered in state courts have preclusive effect on federal litigation involving the same issue. Under California law, a dismissal under Section 581 of the California Code of Civil Procedure with prejudice is an adjudication on the merits. Because the Fund withdrew its case with prejudice, that withdrawal should act as res judicata or as collateral estoppel to its claim in the present dispute.

If CMSH had any liability, it was limited to contributions it was obligated to make to the plan as a direct employer of CMSH Framing, not all contributions made by subcontractor, CMSH Framing. The criteria set forth by the court for an alter ego relationship between CMSH and CMSH Framing are not present. The Employer asked that a finding be made that it has no withdrawal liability, but that if it does, it be limited to ten percent of the amount claimed by the Fund, representing the amount of work it subcontracted to CMSH Framing.

DISCUSSION

The analysis of this case does not rest so much on the many cases and statutes cited by the parties in their respective briefs as it does on a factual determination of the relationship between CMSH and CMSH Framing and the relationship of those two entities to the Carpenters. The record is not entirely clear with respect to the number of Carpenters on whose belhaf contributions were paid by CMSH or CMSH Framing. However, this is not a large Employer. Between CMSH and CMSH Framing, it would appear to the arbitrator that there were no more than four or five regular employees, including Mr. Crouse, Mr. Hagood, Mr. Stiles, Ms. Rone and a the bookkeeper. The Employer's efforts to characterize Mr. Stiles as the president of CMSH Framing in charge of day-to-day operations is, at best, misleading. There is no evidence whatsoever that Mr. Stiles had any relationship

with the Union with respect to negotiating the terms and conditions of the collective bargaining arrangement between either CMSH or CMSH Framing. Mr. Stiles served as a foreman for CMSH and, in essence, served as a foreman for CMSH Framing. His responsibility was to determine how many additional carpenters were needed to assist him on a particular project. Mr. Stiles was a working foreman who carries with him, in addition to his hammer, the title of president. The business and financial decisions were made primarily by Mr. Crouse and Mr. Hagood.

The collective bargaining Agreement, which was signed by CMSH, was signed by Mr. Crouse in 1974. Subsequent to that date, CMSH continued to be obligated to the Carpenters' Agreement by virtue of its membership in BIA. There is no evidence on the record at all that CMSH Framing ever signed a collective bargaining Agreement with the Carpenters. The only collective bargaining Agreement which exists is one obligating CMSH to abide by the terms and conditions of the Agreement, including making pension contributions. When the Employer established CMSH Framing and sent a letter to the Union announcing that CMSH Framing would have to negotiate its own Contract, CMSH set off down the correct road but never followed through on its announced purpose. No one from CMSH Framing ever sat down with the Union to negotiate a Contract. Mr. Crouse sat down with the Union in 1980, 1981 and 1982. During the arbitration hearing, the arbitrator assumed the negotiations conducted by Mr. Crouse were on behalf of CMSH Framing. However, in his February 18, 1981 letter to Mr. Stevens sent on CMSH letterhead, not on CMSH Framing letterhead, and signed by Mr. Crouse as president of CMSH, there is no indication at all that the negotiations are between the Carpenters and CMSH Framing. One would conclude, based on a reading of the letter, that the negotiations were between CMSH and the Carpenters. The reality of the arrangement between

CMSH and CMSH Framing was that CMSH Framing was simply a paper corporation established by CMSH for convenience. In a practical sense, Mr. Crouse treated both CMSH and CMSH Framing as one operation. He maintained control over both companies, both financially and for purposes of collective bargaining. In fact, they were considered one entity to such an extent that Mr. Crouse never bothered to have CMSH Framing sign a separate collective bargaining Agreement. CMSH Framing simply operated under the collective bargaining Agreement signed by CMSH.

There is no indication that the Union ever recognized CMSH Framing as a separate entity with which it had a collective bargaining arrangement. All of the documents sent from the Carpenters pension fund were sent to CMSH at CMSH's address in Sacramento. At no time did CMSH ever attempt to correct the Carpenters and inform them that, in fact, they should be sending pension contribution claims to CMSH Framing at a different address. Instead, Mr. Crouse simply paid the carpenters by signing CMSH Framing checks. Of the 62 checks which appear in the record, 42 were signed by Mr. Crouse and Mr. Hagood. Only twenty of the checks bear the name of Mr. Stiles, along with Mr. Crouse and, on occasion, Mr. Hagood. For an individual who purports to be the president of a company, Mr. Stiles appears to have exercised very little of the authority one would normally associate with the position of president.

There are four criteria which the courts generally consider in determining whether one entity is the alter ego of another. These considerations include centralized control of labor relations, common management, interrelation of operations and common ownership and financial control. When those criteria are applied to CMSH and CMSH Framing, there is only one conclusion which is possible based on the facts in this record. Mr. Crouse maintained absolute central control of labor relations.

He is the only person in the record who ever negotiated with the Union. There is no evidence at all that Mr. Stiles ever had any collective bargaining discussions with the Union. By Mr. Crouse's own testimony, Mr. Stiles' relationship with the Union was limited to obtaining carpenters from the hiring hall, which is the job normally carried out by a foreman, not by the president of a company. There clearly is common management between CMSH, Inc. and CMSH Framing. Mr. Hagood and Mr. Crouse effectively controlled both organizations. Mr. Crouse had full control over CMSH and exercised control over labor relations for CMSH Framing and control over the finances of CMSH Framing by keeping the checkbook. The interrelationship between the two operations is clear, particularly in light of the capitalization of CMSH Framing. The capital to fund CMSH Framing came entirely from CMSH in the form of a non-interesting bearing loan on which payments were never due or ever collected. There is no doubt at all that there was common ownership and financial control. Mr. Crouse and Mr. Hagood controlled both CMSH and CMSH Framing.

There is nothing which this arbitrator sees in MPPAA which would preclude the Fund from collecting withdrawal liability from a corporation which uses an alter ego to contribute money to the Fund. For purposes of the collective bargaining Agreement, CMSH and CMSH Framing were one operation. Because of this fact, they had a contractual obligation arising out of the collective bargaining Agreement to contribute to the pension fund. Having established this obligation, certainly if the entities withdraw from the pension fund, they have an obligation for the withdrawal liability associated with that act. If there is no alter ego relationship between the companies, then certainly the MPPAA common control provisions would need to be considered, but it is unnecessary to consider those provisions because CMSH and

CMSH Framing have a common collective bargaining obligation to the Trust Fund.

The Employer argued that Superior Court Case 883733 should act as res judicata or collateral estoppel as to these arbitration proceedings. The difficulty the arbitrator has with the Employer's argument deals with the fact that the case to which it makes reference was a case brought by the pension fund in order to collect contributions on behalf of carpenters working under the terms of the collective bargaining agreement. The Fund must have realized that the Union and CMSH reached an impasse in October, 1982 at which point CMSH Framing discontinued making contributions to the Fund. In this respect, the Fund could not have collected contributions on behalf of carpenters for periods after October, 1982 and, based on that, withdrew its case against CMSH with prejudice. That issue is considerably different than the one which is before this arbitrator. In this case, the arbitrator is not asked to determine whether contributions should be made on behalf of carpenters who worked for CMSH or CMSH Framing. Instead, the arbitrator is asked to determine whether, based on the Employer's discontinued contributions, that constitutes the Employer's withdrawal from the fund which thereby triggers the withdrawal liability. Case 883733 cannot possibly act as res judicata or collateral estoppel to the issue which is before the arbitrator since that issue did not exist and could not have existed at the time Case 883733 was filed and withdrawn.

CMSH has asked the arbitrator to conclude that if it has withdrawal liability that the withdrawal liability be limited to only those circumstances where CMSH Framing performed work directly for CMSH. It is the estimate of CMSH that if the arbitrator grants its request, it will only be liable for approximately ten percent of the withdrawal liability determined by the carpenters. The arbitrator has already determined that CMSH and

CMSH Framing were created by and under the control of Mr. Crouse and Mr. Hagood. It was for all intense and purposes one in the same operation. The reason the Employer asks the arbitrator to limit CMSH liability to ten percent of that which is owed by CMSH Framing is because CMSH Framing has gone bankrupt. In this respect, the Fund would be unable to collect the remaining amount owed to it by CMSH Framing.

The purpose for the enactment of MPPAA was to protect the pension funds which provide income to employees when they need money on which to retire. The act reflects a strong public policy in favor of assuring that pension funds are protected so that employees who rely on them can do so with some assurance that money will be there when they need it. What CMSH is asking the arbitrator to do is to relieve it of its responsibility to fund the pension on behalf of its own employees, including Mr. Stiles and the son of Mr. Hagood, leaving those employees in a situation where potentially there will be no funds available to them when they are ready to retire. The arbitrator does not understand what arguments CMSH can make in the nature of a public policy that would warrant the relief which it is seeking. There is no legal impediment so far as this arbitrator can determine which would preclude CMSH from the liability generated as a result of the carpenters who worked for it until October, 1982. Initially, when CMSH Framing was established, the Employer may have intended to actually operate two separate corporations for collective bargaining purposes. However, Mr. Crouse either did not have good advice or did not follow the advice he got and simply operated CMSH and CMSH Framing as one operation for collective bargaining obligations. At this point, he as president of CMSH wants to be relieved of any obligations he has towards the employees whose labors provided benefits to him. Under the circumstances, that result is inappropriate.

AWARD

CMSH Framing and CMSH Company should be treated as one company for purposes of withdrawal liability. The withdrawal liability date for this one company is October, 1982. Neither CMSH or CMSH Framing withdrew as defined by MPPAA from the Carpenters' Pension Trust Fund of Northern California prior to the effective date of the MPPAA withdrawal liability provisions. The dismissal with prejudice in Superior Court Case 883733 as to CMSH Company and CMSH Framing is not res judicata or collateral estoppel as to these arbitration proceedings. Both CMSH and CMSH Framing are jointly and severally responsible for any withdrawal liability which may be determined to exist up to October, 1982. As of that date, an impasse existed relieving CMSH and CMSH Framing from any further obligation to make contributions to the Pension Fund. The actual amount of liability is remanded to the parties for their determination.

It is so ordered.

/s/ Gerald R. McKay
GERALD R. MCKAY
Arbitrator

December 18, 1989

APPENDIX E

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

§ 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if—

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan—

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if—

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer—

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

92-66 (2)

No. _____

Supreme Court, U.S.
FILED
JUL 9 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

CARPENTERS PENSION TRUST FUND
FOR NORTHERN CALIFORNIA,

Petitioner,

v.

CMSH COMPANY, INC. AND CMSH FRAMING,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Can an employer, whose collective bargaining agreement expired before the effective date of MPPAA, with no ERISA obligation to contribute to a pension plan after MPPAA's effective date, be assessed withdrawal liability?

2. Can the Courts import the "single employer" test used under Secs. 8(a)1 and 8(a)5 of the National Labor Relations Act to assess withdrawal liability on two separate corporations under ERISA, 29 U.S.C. Sec. 1381(a)?

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BRIEF IN OPPOSITION

CMSH Company, Inc. and CMSH Framing submit this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit that was filed on June 18, 1992 by Carpenters Pension Trust Fund for Northern California.

STATUTES INVOLVED

Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001, *et seq.*

STATEMENT OF THE CASE

In most respects, the statement of the case presented by Petitioners is correct. However, it should be noted that the case was presented to the arbitrator on an Agreed Statement of Facts along with two hours of undisputed testimony of William Crouse. Consequently, the arbitrator did not make a determination as to the underlying facts. The Agreed Statement of Facts is Appendix A of this opposition.

The following Agreed Statements (AS) are of some import.

1) (AS) 18: Michael Stiles was responsible for the day to day management of CMSH Framing. Michael had been the foreman at CMSH and then became the responsible officer of CMSH Framing.

2) (AS) 11: In mid 1978, CMSH ceased performing operations covered by the terms of the collective bargaining agreement and instead subcontracted all such work out to CMSH Framing.

3) (AS) 14: On March 28, 1980, CMSH Company, Inc. and CMSH Framing advised the Carpenters that they were terminating the collective bargaining agreement on its expiration date of June 15, 1980.

4) (AS) 4: At all times relevant, William Crouse was the Vice President of CMSH Framing.

In addition, testimony in the arbitration transcript (AT) went undisputed and found:

1) (AT:45). "It was Mike Stiles' duty to understand the terms of the collective bargaining agreement. Mike Stiles went into business as Stiles Construction after the framing company went broke. (AT:38). Well again, Mr. Stiles handled all of the hiring of everybody – carpenters, laborers. It was Mike Stiles duty to understand the terms of the collective bargaining agreement."

In addition, excerpts from case 883733, litigation between the Carpenters Pension Trust Fund for Northern California and CMSH Framing and CMSH in San Francisco Superior Court included a letter from CMSH Company, Inc. to the Carpenters stating "This is to notify you that CMSH Company, Inc. has now separated into separate affiliate corporations. These corporations are CMSH Framing, CMSH Electrical, CMSH Heating and CMSH Inc." The letter was sent prior to the expiration of the collective bargaining agreement.

The arbitrator, Gerald McKay, ignored and found contrary to several of the Agreed Statement of Facts. In addition, he ignored statutory limitations and applicable decisional law. Likewise, the District Court, the Hon. J. P. Vukasin presiding, in a one page decision affirmed the decision of the arbitrator without reference to statutory and decisional parameters.

The Ninth Circuit, however, correctly applied 29 U.S.C. § 1301(b) which requires that two businesses can be treated as one for MPPAA withdrawal liability purposes only if they are under common control. Common control is clearly defined in 26 U.S.C. § 414(c) and 26 U.S.C. § 1563(a). The Petitioner at last agrees that Respondents were not businesses under common control. See *United States v. Vogel Fertilizer Company*, 455 U.S. 16 (1982).

The Ninth Circuit concluded that application by the arbitrator and the District Court of *J.M. Tanaka Construction v. NLRB*, 675 F.2d 1029, 1033-35 (9th Cir. 1982) to assess MPPAA withdrawal liability was error. The Ninth Circuit referred, rather, to *Audit Service v. Rolfson*, 641 F.2d 757, 764 (9th Cir. 1981) to determine whether an alter ego doctrine was applicable in the instant case under the statutory strictures of *ERISA*. Simply stated, the liability Petitioner seeks to attach to Respondent CMSH Company, Inc. is a statutory liability and, therefore, this Court must look to the statute and decisions under that statute. In doing so, it is clear that the Ninth Circuit did not err.

REASONS FOR DENYING WRIT

SUMMARY

1. Neither of Respondent corporations had an ERISA obligation to contribute to Petitioner Fund after June 10, 1980, the expiration of the collective bargaining agreement. As such, withdrawal occurred prior to the effective date of MPPAA and there can be no liability for the withdrawal.

2. Two corporations can only be treated as one entity under MPPAA if they are controlled corporations (clearly not the case in the instant situation) or if one corporation is established as a sham in order to avoid the collective bargaining obligation. Again, the Petitioner admits that this was not the case.

3. Even under the National Labor Relations Act the "alter-ego" doctrine requires an attempt to avoid the obligation under the collective bargaining agreement and binds the *successor* corporation to the terms of the collective bargaining agreement *during the life of the agreement*. The "single employer" doctrine used to determine "employer" under the NLRA does not require an intent to avoid the agreement. It however, is clearly inapplicable in determining *MPPAA* withdrawal liability.

4. Superior Court Case No. 93333 between Petitioner and Respondents, dismissed with prejudice and involving the collective bargaining agreement applicable to the instant case, is *res judicata* on any and all claims of Petitioner herein.

1. Neither Of The Respondents Had An ERISA Obligation After June 15, 1980 And, Therefore, Liability Cannot Be Assessed Under Any Circumstances.

Petitioner argues that the import of MPPAA withdrawal liability cannot be overstated. Relying on the Supreme Court's decision upholding the constitutionality of the retroactive application of MPPAA to a construction industry employer in *R.A. Gray and Co.* it, at the outset, misleads this Court. Immediately after that decision, Congress amended MPPAA and eliminated retroactive application of the Act. 29 U.S.C. 1381(a) provides:

> "Any withdrawal liability incurred by an employer pursuant to Part I of Subtitle E of Title IV of the Employee Retirement Income Security Act of 1974 as a result of the complete or partial withdrawal of such employer from a multiemployer plan before September 26, 1980 shall be void."

Furthermore, (c) provides that:

> "The amendments made by this section . . . shall not be construed to increase the liability incurred by any employer pursuant to Part I of Subtitle E of Title IV of the Employee Retirement Income Security Act . . . as in effect immediately before the amendments made by subsection (b) . . . as a result of the complete or partial withdrawal of such employer from a multiemployer plan prior to September 26, 1980."

Clearly, Congress has spoken. (AS) 13 provided that CMSH Company, Inc. *ceased covered operations in 1978.*

Withdrawal clearly occurs when an employer "permanently ceases all covered operations under the Plan." 29 U.S.C. § 1383.

In addition, as the Circuit Court found, withdrawal also occurs when an employer "permanently ceases to have an obligation to contribute under the plan." Since the only applicable collective bargaining agreement expired on June 15, 1980, 3 months before the effective date of MPPAA, neither CMSH Inc. nor Framing was bound by any collective bargaining agreement or had any obligation to make pension payments after MPPAA became effective. Any obligations incurred after that point were incurred by Framing alone. Framing did not have any pension payment obligations under ERISA because it made payments until negotiations for a new agreement reached impasse. No ERISA obligation for pension payments exists after the expiration of an agreement. See *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 44 U.S. 539, 545-551 (1988).

2. Even If CMSH Framing Had Not Withdrawn Prior To The Effective Date Of MPPAA, Its Obligation Cannot Be Transferred To CMSH Company, Inc.

Petitioner Fund urges this Court to grant the Petition for Writ of Certiorari on the grounds that the Circuits are split on an issue that would affect the outcome of this case. Nothing could be further from the truth. "Centralized control of labor relations, common management and relation of operations, and common ownership and financial control" are all elements used to determine a "single

employer" under the *National Labor Relations Act* [Secs. 8(a)(1) and 8(a)(5)] or the "economic reality" of two employers being one under the *Fair Labor Standards Act*. Circuit Courts that have addressed the common law alter-ego concept as applicable under MPPAA, the issue in *this* case, have been in accord.

They have concluded that MPPAA does not, on its face, indicate any intention to treat corporate debts for withdrawal liability any differently than any other corporate debt. Furthermore, the purposes of MPPAA, as described in the legislative history of the Act, would not be served by an extension of personal liability for corporate withdrawal payments. The Act represents a balance between efforts to protect existing pension plan beneficiaries through a short term strategy of imposing burdens on current employer contributors and through a long term strategy of encouraging new employers to contribute to multi-employer pension funds. *DeBrecini v. Graf Bros. Leasing, Inc*, 828 F.2d 877, 880 (1st Cir. 1987); See also H.R. 96-869, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News at 2918, 2919-220, 2935.

Imposing personal liability of withdrawal payments would hurt that long term strategy by discouraging controlling individuals from directing their corporations to participate in multi-employer pension funds. *DeBrecini* at 880. Petitioner is asking this Court to expand clearly delineated MPPAA employer liability by piercing the corporate veil [with no showing of fraud or intent to avoid the collective bargaining agreement] and reaching shareholder assets in a *second* corporation. If this rule is adopted corporations with overlapping directorates that are not part of a commonly controlled group [as defined

in MPPAA and the IRC] would be "discouraged from directing (related) corporations to participate in multi-employer pension plans.".

As stated in *DeBrecini, supra,* at 879, withdrawal liability under MPPAA is quite different than payroll tax obligations under the Social Security Act and minimum wage payments due under the Fair Labor Standards Act, two corporate debts for which controlling shareholders and officers can be held liable. To find alter-ego under MPPAA and pierce the corporate veil, all Circuits agree that Petitioner Fund would have to prove

> "the small respect paid by the shareholders themselves to separate corporate entities; the fraudulent intent of the incorporators; and the degree of injustice that would be visited on the litigants by recognizing the corporate identity."

This has not been alleged, let alone proven. The "economic reality" test applied in cases decided under the FLSA was also soundly rejected for MPPAA purposes in *Connors v. P&M Coal Co.*, 801 F.2d 1370-73 (D.C. Cir. 1986) at 1377, 1378. See also *Operating Engineers Pension Trust v. Reed*, 726 F.2d 513, 515 (9th Cir. 1983); *Combs v. Sunup Coal Co.*, 634 F.Supp 13, 18-19 (D.D.C. 1985); *Connors v. B.M.C. Coal Co.*, 634 F.2d 74, 76-77 (D.D.C. 1986); *Mason Tenders District Council Welfare Fund v. Dalton*, 648 F.Supp 1309 (S.D.N.Y. 1985) at 316-317; *Solomon v. Klein*, 770 F.2d 352 (3d Cir. 1985).

All the Circuits that have ruled on this issue have concluded that the corporate veil cannot be pierced even to a 100% controlling shareholder under MPPAA unless fraudulent intent to avoid the corporate obligation has

been alleged and proven. Petitioners instead hope to saddle liability on CMSH Company, Inc. merely on a common/centralized control theory, already found universally impermissible by the Courts.

3. The Alter Ego Doctrine As Correctly Applied Under The National Labor Relations Act Requires Showing Of An Attempt To Avoid The Collective Bargaining Obligations.

It is clear from the above referenced cases and the Courts' refusal to impose an FLSA interpretation on an ERISA matrix that National Labor Relations Act interpretations are equally inapplicable. However, even if the NLRA alter-ego doctrine was grafted onto ERISA, its requirements have not been met in the instant case. Rather, it is the "single employer" doctrine [analyzing and applying Secs. 8(a)(1) and (b)(5) of the NLRA] that the Petitioner addresses and which the Circuit Courts have interpreted with some degree of difference.

As stated in *Carpenters Local Union No. 1478 v. Stevens*, 743 F.2d 1271 (1984) at 1276:

> "Under the single employer doctrine, two companies may be bound by a union contract signed by one of them if they are a single employer and the employees of each constitute a single bargaining unit. (Citations omitted). The following factors are considered in determining whether two or more business entities are a single employer: (1) interrelationship of operations, (2) management, (3) centralized control of labor relations, and (4) ownership . . . No factor is controlling and all need not be present. Similar

> factors are considered in applying the alter-ego doctrine. The single employer and alter-ego doctrine function differently, however. To impose a labor agreement on a non-signatory company under the single employer doctrine, the employees of both companies must be shown to constitute a single bargaining unit. Such a showing is not required under the alter-ego doctrine. It focuses on whether there is *an attempt to avoid the obligations of the collective bargaining agreement through a sham transaction* or a technical change in operation." (Citations omitted), (emphasis added).

The following cases recognize the distinction between the single employer and alter-ego doctrines: *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18 (1st Cir. 1983), cert. denied, 464 U.S. 892, 104 S.Ct. 327, 78 L.Ed.2d 228 (1983); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305 (8th Cir. 1984), cert. denied, 469 U.S. 1088, 105 S.Ct. 595, 83 L.Ed.2d 704 (1984); *Alkire v. NLRB*, 716 F.2d 1014 (4th Cir. 1983); *NLRB v. Scott Printing Corp.*, 612 F.2d 783 (3rd Cir. 1979).

In *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1986) the Court, though concluding that employer intent is not essential nor a prerequisite of alter-ego status, it was one of the relevant factors which the *NLRB* could consider. That Court noted that the essential inquiry under an alter-ego analysis is "whether there was a bona fide discontinuance and a true change of ownership or merely a disguised continuance of the old employer." At 581. Again, this case analyzed obligations under the National Labor Relations Act, decided by the National Labor Relations Board, and not expansion of MPPAA

liability under ERISA. Even so, "disguised continuance" is merely a subjective analysis of intent as opposed to objective indicia establishing mens rea. Courts that have not analyzed the single employer doctrine against the alter-ego doctrine have tended to blur the differences between the two or implicitly applied one where the other should have been applied. See *Goodman Piping Products Inc. v. NLRB*, 741 F.2d 10 (2d Cir. 1984); *J. M. Tanaka Construction v. NLRB*, 675 F.2d 1029 (9th Cir. 1982).

Petitioner wrongly infers that intent to avoid the collective bargaining agreement was found unnecessary in *A. Dariano & Sons v. District Council No. 33*, 869 F.2d 514 (9th Cir. 1989). The *Dariano* Court stated:

> "The focus of an alter-ego test, unlike the single employer test is on the existence of a disguised continuance of the same business or an attempt to avoid the obligations of the collective bargaining agreement through a sham transaction or a technical change of operations."

Only if the transfer is designed to avoid the NLRA obligation by setting-up what appears to be a new company, a disguised continuance of the old one, will the Court find the successor company an alter-ego of the old company and bound to its predecessor's collective bargaining agreement. Even applying the NLRA "alter ego" test in the instant case the Petitioner comes up short-handed. The doctrine would bind *Framing* to the CMSH agreement during the *life of the agreement*. Since it expired on June 15, 1980, neither the original signatory [CMSH] or its successor [CMSH Framing] had any obligation past that date. In fact, since the agreement was an 8(f) pre-hire agreement there was not even an obligation to bargain.

Todd v. McNeff, 667 F.2d 1292 (9th Cir. 1982); *John Deklewa & Sons*, 282 N.L.R.B. No. 1375 (1987), *aff'd.* 843 F.2d 770 (3rd Cir. 1988); *Mesa Verde Construction v. Northern California District Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988).

Aside from the fact that an NLRA analysis may not be blithely superimposed on MPPAA, it is clear that CMSH Framing, established over two years before the effective date of MPPAA, having paid all contributions required under the collective bargaining agreement, having notified the Union and the Petitioner [by correspondence and by virtue of paying benefits on CMSH Framing checks] of its existence, Framing was not a disguised continuance created in an attempt to avoid the obligations of the collective bargaining agreement through a sham transaction or change in operations.

Therefore, either on the facts or the law, *Dariano* does not support the position of Petitioners. The same is true of other cases cited. See *Haley & Haley v. NLRB*, 880 F.2d 1147 (9th Cir. 1989); *NLRB v. O'Neil*, ___ 2d ___, Nos. 90-70643, 90-70645, June 5, 1992; *Carpenters Local U. No. 1846 v. Pratt-Farnsworth*, 690 F.2d 489 (5th Cir. 1982); *NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331 (6th Cir. 1990).

4. The Ninth Circuit Decision Supports The Congressional Intent of Limiting Corporate Liability To The Corporation Involved.

The Petitioner's argument that the purposes of MPPAA will be obliterated if the Ninth Circuit's decision is allowed to stand is without merit.

As much as MPPAA is designed to protect beneficiaries of pension funds by imposing a liability on employers it is also designed to encourage participation by employers in the plan. Expansive liability on corporate shareholders or related corporations that do not meet the definition of commonly controlled corporations deters participation in the plans, contrary to legislative intent and the purposes of the Act.

Furthermore, Petitioners assumed scenario that CMSH's "liability" will be transferred to remaining employers and contributions will have to be increased encouraging other withdrawals leading to another increase in costs and, eventually, to a downward spiral of the vitality of the plan is without merit.

If scenarios are to be indulged, one in which the trustees of the plan a) do not increase benefits until the unfunded vested liability has been eradicated and b) adopt a realistic actuarial interest assumption *commensurate with the actual interest earned by the Plan* thereby reducing artificial unfunded vested liability, more closely approximates reality and results in greater plan participation by employers. Simply stated, Petitioner holds the key to lock in the Fund's financial stability. Expanding withdrawal liability beyond the confines Congress clearly intended is certainly not the answer to its alleged concerns.

CONCLUSION

For the reasons noted above, the petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDICES

§ 1381. Withdrawal liability established; criteria and definitions

"(a) In general –

"(1) Liability. – Any withdrawal liability incurred by an employer pursuant to part 1 of subtitle E of title IV of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1381 et seq. [section 1381 et seq. of this title]) as a result of the complete or partial withdrawal of such employer from a multiemployer plan before September 26, 1980, shall be void.

"(2) Refunds. – Any amounts paid by an employer to a plan sponsor as a result of such withdrawal liability shall be refunded by the plan sponsor to the employer with interest (in accordance with section 401(a)(2) [section 401(a)(2) of Title 26, Internal Revenue Code of 1954]), less a reasonable amount for administrative expenses incurred by the plan sponsor (other than legal expenses incurred with respect to the plan) in calculating, assessing, and refunding such amounts.

"c) No increase in liability. – The amendments made by this section [amending sections 1385 note, 1391, 1397, 1399, 1415 and 1461 of this title] shall not be construed to increase the liability incurred by any employer pursuant to part 1 of subtitle E of title IV of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1381 et seq. section 1381 et seq. of this title), as in effect immediately before the amendments made by subsection (b), [amending sections 1385 note, 1391, 1397, 1399, 1415 and 1461 of this title] as a result of the complete or partial withdrawal

of such employer from a multiemployer plan prior to September 26, 1980.

§ 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer –

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if –

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan –

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if –

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer –

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

In the matter of	)
CMSH COMPANY, INC., and CMSH FRAMING	)
vs.	)
CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA	)
Withdrawal Liability Dispute	)

STATEMENT OF AGREED FACTS

The above-captioned parties hereby agree that the underlying withdrawal liability dispute will be submitted upon this Statement of Agreed Facts. The respective parties reserve the right to raise additional factual issues and introduce additional evidence pursuant to a further stipulation to be entered into prior to the hearing in the underlying arbitration.

The following facts are stipulated to and agreed upon by the parties hereto:

1. CMSH Company, Inc. is a California corporation incorporated under the laws of the State of California in conformance with the California Corporation's Code.

2. CMSH Company, Inc. at all times relevant hereto has maintained a corporate employer identification number, licensing bond, contractor's license, checking accounts, office address, phone, and bank accounts in its name.

3. At all relevant times herein, William Crouse has been President of CMSH Company, Inc. (CMSH).

4. At all relevant times herein, William Crouse was Vice President of CMSH Framing Company, Inc. (CMSH Framing).

5. At all relevant times herein, William Crouse has had a fifty percent (50%) ownership interest in CMSH and a twenty-seven and one-half percent (27.5%) ownership interest in CMSH Framing.

6. At all relevant times herein, Robert Hagood had a fifty percent (50%) ownership interest in CMSH and a twenty-seven and one-half percent (27.5%) ownership interest in CMSH Framing.

7. At all relevant times herein, Michael Stiles had a forty-five percent (45%) ownership interest in CMSH Framing.

8. In June 1974, William Crouse, on behalf of CMSH, signed a collective bargaining agreement with the Carpenters 46 Northern California Counties Conference Board (Carpenters). A copy of the applicable Carpenters Master Agreement is attached hereto and incorporated herein by reference as Exhibit "A".

9. The 1974-77 Carpenters Master Agreement was amended, modified and changed by a successor Carpenters Master Agreement in June 1977. Attached hereto and incorporated herein by reference as Exhibit "B" is a true and accurate copy of the 1977-80 Carpenters Master Agreement.

10. From 1974 to mid 1978, CMSH employed carpenters under the terms of the applicable Carpenters Master Agreement. After the expiration date of the 1974-77 Master Agreement, and during negotiations with

the Carpenters, CMSH continued to employ carpenters under the terms of the contract.

11. In mid 1978 CMSH ceased performing operations covered by the terms of the collective bargaining agreement and instead subcontracted all such work out to CMSH Framing.

12. CMSH Framing was incorporated on July 11, 1978.

13. Commencing in 1978, CMSH Framing obtained a contractor's license and employed carpenters under the terms of the 1977-80 Carpenters Master Agreement (Exhibit "B" hereto). CMSH Framing made fringe benefit contribution payments to the Carpenters Pension Trust Fund for Northern California (Carpenters Pension Fund).

14. On March 28, 1980, CMSH Company, Inc. and CMSH Framing advised the Carpenters 46 Northern California Counties Conference Board that they were terminating the current collective bargaining agreement on its expiration date of June 15, 1980.

15. In April 1980, CMSH and CMSH Framing notified the Carpenters that they wished to open the collective bargaining agreement and enter into negotiations with the Carpenters.

16. Subsequent to June 15, 1980, the termination date of the 1977-80 Carpenters Master Agreement, CMSH Framing continued to employ individual carpenters under the terms of the Carpenters Master Agreement and continued to pay fringe benefit contributions to the Carpenters Pension Fund for those hours of covered employed.

17. CMSH Framing was a corporation at all times relevant hereto incorporated under the laws of the State of California, with its own employer identification number separate and apart from CMSH, its own license, its own bond, its own bank accounts and its own payroll record.

18. Michael Stiles was responsible for the day to day management of CMSH Framing. William Crouse was responsible for the day to day management of CMSH Company, Inc. Michael Stiles had been the foreman for CMSH Company, Inc. and then became the responsible officer of CMSH Framing.

19. In 1981, CMSH Framing utilized the Carpenters Apprenticeship Training Program and employed indentured apprentices under the Carpenters program which is certified by the Division of Apprenticeship Standards, State of California.

20. A true and accurate copy of the Carpenters Apprenticeship Trust Fund appears in the booklet containing the various Carpenter Trust Agreements, which is attached hereto and incorporated herein by reference as Exhibit "C".

21. Anne Rhone, an employee of both CMSH and CMSH Framing, handled the employee benefit contribution report forms transmitted to the various Carpenter Trust Funds in 1981. Payments were made by Ms. Rhone with those transmittals. Although the reports were sent to CMSH Company, the checks paid were from CMSH Framing and the hours reported were attributable to CMSH Framing's carpenters. Attached hereto and incorporated herein by reference as Exhibit "E" are true and

accurate copies of the contribution report forms submitted by CMSH Framing for calendar years 1980, 1981, and 1982.

22. During the period of August 1978 through October of 1982, CMSH Framing performed work as a subcontractor for CMSH and performed subcontracting work for other employers unrelated to CMSH Framing or CMSH Company, Inc. as more fully stated in Exhibit "F" attached hereto. In fact, over 85% of CMSH Framing's work was done for contractors other than CMSH company, Inc.

23. CMSH Framing finally ceased contributions to the Carpenters Pension Fund in October of 1982 when an impasse in negotiations was reached with the Carpenters.

24. CMSH Framing was dissolved on September 30, 1986.

25. By way of notice dated January 14, 1988, the Carpenters Pension Fund notified CMSH and CMSH Framing of the withdrawal liability assessment totalling $229,170.00. Attached hereto and incorporated herein by reference as Exhibit "D" is a true and accurate copy of the withdrawal liability notice sent. The withdrawal liability assessment by the Carpenters Pension Fund treats CMSH and CMSH Framing as one employer.

26. No payments have been made by CMSH or CMSH Framing to the Carpenters Pension Fund pursuant to the withdrawal liability assessment.

27. CMSH Framing received funds from CMSH Corporation, Inc. The loans are represented by a note due

CMSH corporation, Inc. as reflected on the financial statements of CMSH Framing.

Dated: ___, 1989

LIPTON & LIPTON

By: _____
MARK H. LIPTON
Attorneys for CMSH & CMSH Framing

Dated: ___, 1989

VAN BOURG, WEINBERG, ROGER & ROSENFELD

By: _____
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